

NOT INDENTED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
DONALD MARK GILLELAND,	:	BANKRUPTCY CASE
	:	NO. 01-17797-WHD
Debtor.	:	
_____	:	
	:	
GARY W. BROWN, as Chapter 7	:	
Trustee for the bankruptcy estate of	:	
Donald Mark Gilleland,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 04-1012
v.	:	
	:	
WOODBURY BANKING COMPANY,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Amend Complaint, filed by Gary W. Brown (hereinafter the "Trustee"), the trustee for the bankruptcy estate of Donald Mark Gilleland (hereinafter the "Debtor"). The defendant, Woodbury Banking Company (hereinafter "Woodbury") objects to the Motion.

On March 2, 2004, the Trustee filed a complaint against Woodbury, in which he alleges that Woodbury is in possession of certain securities that were owned by the Debtor at the time he filed his bankruptcy petition. Tthe Trustee seeks turnover of the

securities or their value, pursuant to § 542 of the Bankruptcy Code. Along with his motion to amend, the Trustee has filed a proposed amended complaint and a supplemental proposed amended complaint in which he further alleges that: 1) Woodbury foreclosed improperly upon the Debtor's real property; 2) after foreclosing upon the Debtor's real property, Woodbury received excess foreclosure proceeds without remitting the overage to the Debtor or the Trustee; and 3) Woodbury violated the Fair Debt Collections Practice Act (hereinafter the "FDCPA"). The Trustee now seeks the turnover of the excess foreclosure proceeds, as well as damages arising from Woodbury's improper foreclosure and its failure to comply with the requirements of the FDCPA.

In response, Woodbury opposes the Trustee's motion and argues that: 1) the Trustee's proposed complaint seeks to "expand the proceedings unnecessarily"; 2) the Trustee's claim under the FDCPA is barred by the applicable statute of limitations; and 3) the FDCPA is not a statute that is "aimed at the activity of Woodbury," and Woodbury's actions in this matter are not prohibited by the FDCPA.

Rule 15 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedures, governs amended pleadings. *See* FED. R. CIV. P. 7015. In pertinent part, Rule 15 provides:

(a) A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be given freely when justice so requires.

FED. R. CIV. P. 7015(a). Inasmuch as the Trustee filed his motion to amend after Woodbury answered the complaint, the Trustee cannot amend his complaint without leave of the Court or the written consent of Woodbury, which Woodbury has not given.

A trial court has considerable discretion when determining whether to grant leave to amend a complaint. *See Jameson v. The Arrow Co.*, 75 F.3d 1528, 1534-35 (11th Cir. 1996). “Although ‘[l]eave to amend shall be freely given when justice so requires,’ a motion to amend may be denied on ‘numerous grounds’ such as ‘undue delay, undue prejudice to the defendants, and futility of the amendment.’” *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000); *see also Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

Woodbury’s argument that the Trustee seeks to expand the proceedings unnecessarily lacks merit. The Court reads the Trustee’s complaint to allege that Woodbury conducted an improper foreclosure and violated the Debtor’s rights under federal law. If these allegations are true, and the Debtor would have had a valid claim against Woodbury for damages, the Trustee not only has the right, but the duty, to bring these causes of action against Woodbury on behalf of the Debtor’s bankruptcy estate. *See* 11 U.S.C. § 323(b); 11 U.S.C. § 704(1); *In re Witko*, 374 F.3d 1040 (11th Cir. 2004). In short, the Court sees nothing unnecessary about the Trustee’s actions.

Woodbury also objects to the Trustee’s pursuit of these claims on the basis that

Woodbury conducted the foreclosure three and a half years ago, and that the statute of limitations applicable to an action under the FDCPA has expired. The Court agrees that it would be futile to allow an amendment to add a claim if that claim would be barred by the statute of limitations. *See Mackensworth v. S.S. American Merchant*, 28 F.3d 246 (2d Cir. 1994) (affirming lower court's denial of leave to amend complaint when new claim did not relate back to filing of original complaint and would have been time barred). Accordingly, if the Court can determine from the face of the Trustee's complaint that the new claims are time barred, the Court will deny the amendment.

As to the Trustee's potential claim under the FDCPA, Woodbury asserts that the claim is barred by a one-year statute of limitations. Under the FDCPA, a consumer debtor may seek damages against a "debt collector" who fails to comply with the provisions of the FDCPA. *See* 15 U.S.C. § 1692(k). Said damages include "an amount equal to the sum of": 1) "any actual damage sustained by such person as a result of such failure;"; and 2) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000," plus "the costs of the action, together with a reasonable attorney's fee as determined by the court." *Id.* Such an action must be brought "within one year from the date on which the violation occurs." *Id.*

The Trustee's Amended Complaint alleges that Woodbury violated the FDCPA by failing to notify the Debtor of his right to seek a verification of the debt prior to the foreclosure and related collection activities. The Court assumes that this violation must

have occurred prior to the date upon which Woodbury conducted the foreclosure, which the document attached to the Trustee's Amended Complaint indicates was June 5, 2001. Accordingly, the Debtor would have been required to bring any claim under the FDCPA within one year of that date, or by June 5, 2002. However, the Debtor filed his voluntary bankruptcy petition prior to the expiration of the statute of limitations.

Pursuant to § 108(a), if applicable nonbankruptcy law requires a debtor to commence an action, and the period in which the debtor may do so has not yet expired, the trustee may commence the action "before the later of": 1) "the end of such period, including any suspension of such period occurring on or after the commencement of the case"; or 2) "two years after the order for relief." 11 U.S.C. § 108(a). The applicable nonbankruptcy law in this case is the FDCPA, which required the Debtor to file the action before June 5, 2002. When the Debtor filed his bankruptcy petition, the limitations period had not yet expired. Therefore, the limitations period was extended to the later of June 5, 2002 or two years after the order for relief, which was November 5, 2003. The Trustee filed his initial complaint against Woodbury on March 2, 2004. Even if the Court were to determine that the Trustee's Amended Complaint relates back to the original complaint, the original complaint was not filed within the limitations period. Accordingly, Woodbury is correct that, from the face of the complaint, the Trustee's FDCPA claim is time-barred, and the Court concludes that allowing an amendment to

add this claim would be futile and should not be allowed.¹

The Trustee also seeks to add a claim for damages arising from an alleged wrongful foreclosure. Because the foreclosure at issue involved real property located in Georgia, the laws of the State of Georgia are applicable to the Trustee's claim. *See* O.C.G.A. § 44-14-162 et seq.

"[W]hen a power of sale is exercised ' "[a]ll that is required of [the foreclosing party] is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith." *Kennedy v. Gwinnett Commercial Bank*, 155 Ga.App. 327, 330(1), 270 S.E.2d 867 (1980). "Good faith" in conducting the sale is not necessarily limited to the provisions of the deed. A power of sale " 'simply evidences an agreement between the parties that the (mortgagee) shall be relieved from the necessity of resorting to a foreclosure at law or in equity'" However, even though the power of sale is conferred upon the grantee for the purpose of facilitating his collection of the amount of the underlying debt which is secured by the property, the power must be exercised fairly. [OCGA §§ 23-2-114.]" *Id.* at 328-329(1), 270 S.E.2d 867. A "breach of this duty to conduct the sale 'fairly' gives rise to a claim for damages to the injured holder of the equity of redemption." *Id.* at 329(1), 270 S.E.2d 867; *accord Calhoun First Nat. Bank v. Dickens*, *supra* at 285-286(1), 443 S.E.2d 837.

Brown v. Freedman, 474 S.E.2d 73, 76 (Ga. App.1996).

The Trustee has alleged that Woodbury failed to provide the Debtor with notice of default and an opportunity to cure the default prior to its acceleration of the debt, as required under the terms of the Deed to Secure Debt. The Trustee seeks damages for this

¹ Because the Court has determined that any potential claim under the FDCPA is time barred, the Court need not consider Woodbury's argument that the FDCPA is not applicable to its collection activities.

alleged breach of Woodbury's contractual duty to conduct the foreclosure in accordance with the terms of the Deed to Secure Debt.

Although Woodbury contends that the Trustee's claims are time barred, neither Woodbury nor the Trustee has stated a position as to the length of any statute of limitation that may be applicable to the Trustee's claim. Therefore, the Court declines to consider this issue at this time. The Court also notes that the doctrine of laches may be applied to bar a claim for wrongful foreclosure. *See* O.C.G.A. § 9-3-3; *Kidd v. First Commerce Bank*, 591 S.E.2d 369, 373 (Ga. App. 2003). "Whether laches should apply depends on a consideration of the particular circumstances, including the length of the delay in the claimant's assertion of rights, the sufficiency of the excuse for the delay, the loss of evidence on disputed matters, the opportunity for the claimant to have acted sooner, and whether the claimant or the adverse party possessed the property during the delay." *Id.* Because the Court does not have before it sufficient information to conduct an analysis of the appropriate factors, the Court cannot determine from the face of the complaint that the Trustee's claim for damages arising from the wrongful foreclosure is barred by any equitable doctrine of estoppel, such as laches. Having found no other reason to deny the amendment, the Court will allow the Trustee to amend the complaint to add this claim.

CONCLUSION

_____For the reasons state above, the Trustee's Motion to Amend Complaint is hereby **GRANTED** in part and **DENIED** in part. To the extent that the Trustee's proposed amended complaint alleges that Woodbury improperly foreclosed upon property of the Debtor and seeks the turnover of excess foreclosure funds and damages, the Court will consider the complaint to be amended to incorporate these allegations, subject to Woodbury's right to raise and brief a statute of limitation defense.

The Trustee's motion to amend to add a claim arising under the FDCPA is denied without prejudice to the Trustee's right to present additional argument or facts that may support a conclusion that the limitations period was otherwise tolled or suspended prior to its expiration.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of December, 2004.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE